IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 19[redacted]

No. [redacted] 19[redacted]

CLIFFORD TAGGART, ET AL. *Petitioners*

v.

WEINACKER'S, INC. *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

S.G. LIPPMAN
1741 DeSales Street, N.W.
Washington, D. C. 20036

BERNARD DUNAU
912 Dupont Circle
Building, N.W.
Washington, D. C. 20036

OTTO E. SIMON
JAMES C. WOOD
1010 Van Antwerp Building
Mobile, Alabama 36602

Attorneys for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	3
A. The Physical Layout of the Area Surrounding the Store	3
B. The First Request for Immediate Injunctive Relief	3
C. The Second Request for Immediate Injunctive Relief	4
D. The Plea to the Jurisdiction of the Court Based on the Preemption of the Subject Matter by the National Labor Relations Board	5
E. The Decision of the Circuit Court of Mobile County	10
F. The Decision of the Supreme Court of Alabama	13
Reasons for Granting the Writ	15
Conclusion	31
Appendix A—Opinion of the Supreme Court of Alabama	1a
Appendix B—Judgment of the Supreme Court of Alabama	22a
Appendix C—Opinion and Judgment of the Circuit Court of Mobile County, Alabama, In Equity	23a
Appendix D—Writ of Injunction	28a
Appendix E—Relevant Provisions of the National Labor Relations Act, as Amended	29a

AUTHORITIES CITED

Cases:	Page
Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308	13, 15, 16, 17, 18, 19, 20, 21, 30, 31
Arlan's Dept. Store of Charleston, Case No. 9-CA-3308, sl. op. p. 10, May 25, 1965	26
Carroll v. President & Commissioners of Princess Anne, 37 U.S. Law Week 4041	18, 20
Fafnir Bearing Co. v. N.L.R.B., 362 F. 2d 716	24
Freeman v. Retail Clerks Union Local 1207, 58 Wash. 2d 426	22
Garner v. Teamsters, 346 U.S. 485	23
Harlan Fuel Co., 8 NLRB 25	28
Inferlake S.S. Co., 174 NLRB No. 55	24
Local No. 438 Construction Union v. Curry, 371 U.S. 542	13
Marlene Industries Corp., 166 NLRB No. 58	28
Marshall Field & Co., 98 NLRB 88	24
Maryland v. Williams, 44 LRRM 2357	22
N.L.R.B. v. Babcock & Wilcox, 351 U.S. 105	25, 26
N.L.R.B. v. Cities Service Oil Co., 122 F. 2d 149	24
N.L.R.B. v. Fruit & Vegetable Packers, 377 U.S. 58	22, 23
N.L.R.B. v. Hearst Publications, 322 U.S. 111	24
N.L.R.B. v. Insurance Agents' International Union, 361 U.S. 477	29
N.L.R.B. v. Lake Superior Corp., 167 F. 2d 147	24
N.L.R.B. v. Stowe Spinning Co., 336 U.S. 226	24, 27
N.L.R.B. v. United Aircraft Corp., 324 F. 2d 128	24
N.L.R.B. v. Weinacker Bros., Inc., C.A. 5, No. 23,510	10
Priced-Less Discount Foods, 162 NLRB No. 75	26, 28
Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793	27
San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236	29
Schwartz-Torrance Investment Corp. v. Bakery Workers Local No. 31, 40 Cal. Rep. 233, 394 P. 2d 921	25
Shuttlesworth v. City of Birmingham, 39 U.S. Law Week 4203	17

Page

Speiser v. Randall, 357 U.S. 513 18
Steelworkers v. N.L.R.B., 376 U.S. 492 27
Thornhill v. Alabama, 310 U.S. 88 27
United Mine Workers v. Arkansas Oak Flooring Co., 351 U.S. 62 30
United Mine Workers v. Gibbs, 383 U.S. 715 30
Weinacker Brothers, Inc., 153 NLRB 459 8
Weis Markets v. Retail Store Employees' Union, Local No. 692, 66 LRRM 2166 22
Youngdahl v. Rainfair, 355 U.S. 131 ..... 23, 29, 30

STATUTE:

61 Stat. 316, 29 U.S.C. § 141, et seq. 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

CLIFFORD TAGGART, ET AL. *Petitioners*

v.

WEINACKER'S, INC. *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Clifford Taggart, business agent of Retail Clerks' Union Local 458 of Mobile (the Union) (R. 23), Riley Hobbs, vice president of the Union, James Stuckey, president of the Union (R. 1), and the Union pray that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama entered in the above-entitled case on September 19, 1968.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is reported at 214 So. 2d 913 (*infra*, p. 1a). The opinion of the Circuit Court of Mobile County, Alabama, is unreported (*infra*, p. 23a).

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on September 19, 1968 (R. 125, *infra*, p. 22a). A petition for rehearing was denied on November 7, 1968 (R. 126). An order was entered on February 4, 1969 by Mr. Justice Hugo L. Black extending the time for filing a petition for a writ of certiorari to April 5, 1969. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

A state court injunction prohibits, as trespass on private property, peaceful picketing on the publicly-used but privately-owned sidewalks adjacent to a store, in support of a strike by the store employees, called by the union certified by the National Labor Relations Board to represent them, to secure employment terms acceptable for work at the store after a breakdown of negotiations with the employer for a collective bargaining agreement. The questions presented are (1) whether this prohibition abridges freedom of speech in violation of the First Amendment as it is incorporated by the Fourteenth Amendment of the United States Constitution; (2) whether the state court is without jurisdiction to adjudicate the controversy, because the protection accorded and the restraint imposed on peaceful picketing in the context of a labor dispute is within the exclusive regulatory scope of the National Labor Relations Act and therefore within the sole competence of the National Labor Relations Board; and (3) whether the prohibition forbids the exercise of the federal right to engage in "concerted activities for . . . mutual aid or protection" guaranteed by Section 7 of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 316, 29 U.S.C. § 141, *et seq.*), are set out in Appendix E (*infra*, pp. 29a-33a).

STATEMENT

A. The Physical Layout of the Area Surrounding the Store

In the city of Mobile, Alabama, respondent Weinacker's, Inc., conducts a general department store business for the sale of groceries, dry goods, hardware, drugs and prepared foods in a single building. Weinacker's owns this building and the area which surrounds it. Within this area sidewalks encircle the building, walkways lead to it, and a motor vehicle parking lot for the use and convenience of the customers in parking their automobiles is located between the front of the building and the public property which adjoins the parking lot. The main entrance to the store building fronts to the south on the private sidewalk; the adjacent motor vehicle parking lot separates the store building and the private sidewalk from a public street called Government Street. The privately-owned area which surrounds the store building is bounded on three sides by public streets, Government Street to the south, Catherine Street to the east, and Macy Street to the west. Public sidewalks are adjacent to these public streets. Weinacker's also operates an automobile service station across Catherine Street to the east. (R. 79, 1.)

B. The First Request for Immediate Injunctive Relief

On January 21, 1965, Weinacker's filed its original bill with the Circuit Court of Mobile County, Alabama, against the Union, its president, its vice-president, and

its business agent, collectively called respondents (R. 1, 22, 76). The bill alleged that (1) Weinacker's "owns the . . . shopping center . . . and its parking area and walkways adjacent to the shopping center . . . used by the customers of the shopping center" (R. 19); (2) the three individual respondents "walked back and forth in front of the door or doors to the shopping center on the area owned and occupied" by Weinacker's "engaged in picketing the shopping center" (R. 4-21); and (3) this picketing constitutes an "unlawful trespass upon its premises" (R. 2). Claiming "irreparable injury" by a "continuous invasion" of its "property and property rights", Weinacker's prayed that the court "forthwith issue a temporary writ to enjoin" the Union and the individual respondents from "directly and indirectly . . . entering upon property of Weinacker's and "that they be enjoined from any act on the property . . . which would be a trespass upon . . . property . . ." (R. 23). The court on the same day denied the request for temporary relief instanter and set the petition for that relief down for hearing on January 25, 1965 (R. 4). On January 22, 1965 the Union and the individual respondents moved to quash the bill on the ground that the court "has no jurisdiction over a lawful strike and the peaceful picketing activities connected therewith" in that the "National Labor Relations Board, federal statutes and procedures have preempted this field . . ." (R. 6-7).

C. The Second Request for Immediate Injunctive Relief

On January 22, 1965, after the court had set the request for temporary relief down for hearing, Weinacker's again petitioned "for immediate injunctive relief." It asserted that two named individual re-

spondents "have proceeded to constantly trespass upon" Weinacker's "property by marching or parading back and forth to the immediate doorway of" its "place of business" and that "this conduct has been more intensive," since the petition for temporary injunctive relief had been set for hearing. It urged that "immediate injunctive relief", is necessary "to enjoin the continuous obstructing of the doorway to the . . . shopping center." (R. 8.) The request was supported by six conclusory and identically-worded affidavits averring that "Respondents have trespassed upon . . . [Weinacker's] property to the extent of obstructing the customers in entering and leaving the door of Weinacker's . . . and that the Respondents in carrying signs are acting in such a way as to interfere with . . . [Weinacker's] business and such action is on the private property" of Weinacker's. (R. 9). An *ex parte* injunction issued forthwith, without any notice or opportunity to be heard, prohibiting "trespassing upon the property of . . . [Weinacker's] and . . . interfering with . . . [Weinacker's] property and right of ingress and egress to the . . . property and place of business" (R. 14, *infra*, p. 29a).

D. The Plea to the Jurisdiction of the Court Based on the Preemption of the Subject Matter by the National Labor Relations Board

On January 25, 1965, the Union and the individual respondents filed a plea to the jurisdiction of the court (R. 15-23). The plea averred that the Union was a labor organization and Weinacker's an employer within the meaning of the National Labor Relations Act (R. 15-16); that the business of Weinacker's "affects" interstate commerce within the meaning of the

National Labor Relations Act, and its labor relations are subject to the exclusive jurisdiction of the National Labor Relations Board" (R. 21); that the activities of the Union and the individual respondents "constitute concerted activity for their mutual aid or protection, the right to engage in which is guaranteed and protected by the National Labor Relations Act" (R. 21); that "the National Labor Relations Board assumed jurisdiction over the subject matter of . . . [Weinacker's] bill and said jurisdiction is exclusive" (R. 21); and that the jurisdiction of the court is "therefore pre-empted . . ." (R. 22).

The plea documented the following specific facts: On December 19, 1963 the Union filed a petition with the NLRB seeking certification as the representative of certain of the employees of Weinacker's (R. 16, 24-25). On February 13, 1964, following a hearing held on January 20, 1964, the NLRB Acting Regional Director, upon finding that Weinacker's "is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction", directed an election in a unit composed of "All full-time and regular part-time employees at Employer's Mobile, Alabama, retail operation, including office clerical employees and the grocery, produce, meat, drug, warehouse, and service station departments . . ." (R. 16-17, 25-28). An election was conducted on March 9, 1964, and resulted in a vote of 18 employees for the Union, 12 against, with 27 ballots challenged (R. 17, 31). On March 13, 1964, Weinacker's filed objections to the conduct of the election (R. 17, 32-33). On April 16, 1964, following an investigation of the objections and the challenged ballots, the NLRB Regional Director issued a decision over-

ruling the objections, resolving the challenged ballots, and certifying the Union as the representative of the unit of employees (R. 17-18, 34-44). On April 25, 1964, Weinacker's requested the NLRB to review the Regional Director's decision, and on May 22, 1964, the NLRB denied the request because "it raises no substantial issues warranting review" (R. 18, 45-55).

On August 31, 1964, amended on September 16 and 30, 1964, the NLRB Regional Director issued a complaint against Weinacker's alleging the commission of numerous unfair labor practices spanning the period from the filing of the representation petition through and after the Union's certification (R. 18-19, 55-67). In summary, the complaint alleged: (1) interrogation of employees concerning their union activities, desires, and feelings, (2) threat of store closure, (3) threat of discharge of any employees who had anything to do with the Union, (4) surveillance of union meetings and activities, (5) statement that no new employees would be hired unless they were against the Union, (6) promise of benefit to an employee for information concerning union leaders, (7) prohibition of wearing of union buttons, (8) promulgation and enforcement of a rule against union solicitation within the store, (9) discharge of nine employees because of their union activity, (10) furnishing four employees less employment because of their union activity, and (11) denial of dining and rest room facilities to two employees because of their union activity (R. 58-61, 65, 67). The complaint further alleged that Weinacker's had defaulted in its bargaining obligation by (1) refusing to bargain in good faith, (2) refusing to furnish wage and related information relevant to bargaining, and (3) unilaterally changing existing employment terms

(R. 62-63, 65). Weinacker's joined issue by a general denial (R. 20, 68-71), and on October 12, 1964, a hearing was begun before an NLRB trial examiner (R. 20).

The plea to the jurisdiction further averred that (1) the refusal of Weinacker's to bargain in good faith "led to a strike which was started by the Respondents on the 12th day of December, 1964" (R. 20); (2) "At no time has there been any force or violence resulting from the peaceful picketing on the part of the Respondents" (R. 20-21); and (3), to enjoin the Union's activities "would infringe upon the rights" of the Union and its members "under the First and Fourteenth Amendment to the Constitution of the United States" (R. 21-22), and would enter the domain preempted by the NLRB (R. 22).

At the time that the plea to the jurisdiction was entered, no decision upon the unfair labor practice complaint had been reached (R. 20). On April 15, 1965 the trial examiner issued, and on June 25, 1965 the NLRB adopted, his decision finding that Weinacker's had committed the unfair labor practices alleged. *Weinacker Brothers, Inc.*, 153 NLRB 459. The decision summarized the unfair labor practices as follows (*id.* at 484-485):

> [1. Weinacker's] interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, by the following conduct:
>
> (a) Unlawfully interrogating employees with regard to their own and their fellow employees' union activities and sentiments.
>
> (b) Threatening to close the store before accepting the Union as the collective-bargaining representative of its employees.

(c) Threatening to discharge employees for adherence to the Union.

(d) Threatening not to hire any employees who are in favor of the Union.

(e) Threatening to reduce hours of work of employees should the Union become their bargaining representative, rather than to give them full employment at union scale.

(f) Threatening to engage in, and engaging in, surveillance of employees' protected activities.

(g) Soliciting employees to withdraw their union authorization cards and helping them to accomplish such action.

(h) Promising a benefit for withdrawing adherence to the Union.

(i) Prohibiting the wearing of union buttons.

(j) Promulgating and maintaining a rule prohibiting solicitation by employees on behalf of the Union or with respect to other protected activities in nonworking areas and during nonworking time except on its selling floor.

(k) Enforcing a no-solicitation rule prohibiting solicitation by union officials while engaging in an extensive antiunion campaign in working areas and on employees' working time.

(l) Threatening to discharge an employee for responding to a subpena to testify in a National Labor Relations Board hearing instead of reporting to work.

[2. Weinacker's] violated Section 8(a)(3) and (1) of the Act by the following conduct:

(a) Discriminatorily discharging Burl Beck, Lorenzo Matthews, Harry Wright, Cleveland Dortch, Marguerite Etheredge, Mildred Turner,

W. J. Williams, Elizabeth Boyette, and Sadie Burgess.

(b) Discriminatorily reducing the workhours of Elizabeth Boyette, Sadie Burgess, Jack Smith, and Donald Harris.

(c) Discriminatorily denying certain employees the dining and restroom facilities they had customarily used.

[3. Weinacker's] violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith with said Union, commencing on May 25, 1964, as the collective-bargaining representative of the unit described hereinabove.

On June 28, 1966, the Court of Appeals for the Fifth Circuit summarily enforced the NLRB order remedying the unfair labor practices found.[1]

E. The Decision of the Circuit Court of Mobile County

On January 25, 1965, the same day that it was filed, the plea to the jurisdiction was overruled (R. 73). On February 1, 1965, the Union and the individual respondents answered (R. 73-76). They averred that they had "legally picketed back and forth in front of the door of the shopping center" (R. 74); denied that they had "obstruc[ed] customers from leaving or entering . . . [Weinacker's] place of business" (R. 75), or that their conduct constituted an illegal trespass (R. 74); affirmed that their acts were within "the realm of peaceful picketing . . . legal under the National Labor Relations Act and the First and Fourteenth Amendments to the Constitution of the United States" (R. 75); and reiterated that the court's juris-

[1] *N.L.R.B. v. Weinacker Bros., Inc.*, C.A. 5, No. 23,510.

diction was preempted (R. 74). The answer concluded with respondents' motion to dismiss the bill and to dissolve the injunction that had been issued (R. 75).

On March 26, 1965, more than two months after the *ex parte* injunction had issued, a nonevidentiary hearing of the motion to dismiss and dissolve was held (R. 78). On April 9, 1965, the Circuit Court issued its decision (R. 78-82, *infra*, pp. 23a-27a). The court found that a labor dispute existed; that the Union had been certified by the NLRB as the representative of the employees of Weinacker's; and "that numerous differences have existed and do now exist between . . . [Weinacker's and the Union] over the matter of a collective bargaining agreement between them, and when contract negotiations broke down, the . . . Union called a strike which is now in progress" (R. 79, *infra*, p. 23a). The court further found that "Picketing was first carried on by the Respondents on the public sidewalks of the City of Mobile and later on the sidwalks on . . . [Weinacker's] premises and in front of the entrances to . . . [Weinacker's] storebuilding. While this picketing on . . . [Weinacker's] premises and in front of the entrances to its building has been without any acts of actual violence or threats of violence to any persons, it has been carried on in such a manner as to obstruct the customers of . . . [Weinacker's] in entering and leaving the entrances to said building on the south or Government Street side thereof" (R. 79-80, *infra*, p. 24a). The court further found that the picketing continued after Weinacker's, "through one of its officials, had requested the respondents not to trespass on Company premises; however, in obedience to the Writ of Temporary Injunction, the Respondents have confined their picketing of . . . [Wein-

acker's] premises to the public sidewalks of the City of Mobile adjoining the same" (R. 80, *infra*, p. 24a).

In considering the legal import of these findings, the court stated that "the first question in this case is whether or not the State Courts have jurisdiction to hear it. And, the second question is whether or not, if the State Courts do have jurisdiction of the subject matter, the Respondents' activities . . . are the subject of injunctive relief" (R. 81, *infra*, p. 25a). Answering the first question, the court held that "where a store owner invites prospective customers to come to his store to trade and to park on his grounds, made available therefor while doing business with the store owner, the invitation is for one particular purpose, not for *any* purpose to the general public, and the use of the store owner's parking lot and sidewalks is of a purely private character over which the State Courts retain jurisdiction to hear suits seeking injunctive relief to bar trespassing" (R. 81, *infra*, p. 26a). Answering the second question, the court held that "it was unlawful for the Respondents to trespass on the Complainant's premises by picketing, after being requested to leave. Freedom of speech, guaranteed to the Respondents by the First and Fourteenth Amendments to the Federal Constitution, did not give them the right to remain on the parking area and sidewalks of . . . [Weinacker's] after they were ordered to leave" (R. 82, *infra*, p. 26a).

The court concluded that it "does have jurisdiction of the subject matter involved in this suit which has not been divested by the National Labor Relations Act" (R. 82, *infra*, p. 26a). It further concluded that "the Respondents, by going on . . . [Weinacker's] premises for the purpose of picketing the . . . store-

building of [Weinacker's], were trespassers, and were employing an unlawful means of exercising their right to picket . . ." (R. 82, *infra*, p. 27a). It decreed that the injunction "heretofore issued . . . be . . . continued until ordered dissolved by due process of law" (R. 82, *infra*, p. 27a). That injunction prohibits "trespassing upon the property of . . . [Weinacker's] and . . . interfering with the . . . property [of Weinacker's] and right of ingress and egress to the . . . property and place of business [of Weinacker's]" (R. 14, *infra*, p. 29a).

F. The Decision of the Supreme Court of Alabama

On April 9, 1965, an appeal was taken from the Circuit Court's judgment to the Supreme Court of Alabama (R. 82-83). The appeal was argued and submitted on November 10, 1965 (R. 94). The appeal was decided on September 19, 1968 (R. 95, *infra*, p. 1a), almost three and one-half years after it had been taken, and almost three years after it had been submitted. In the interim this Court on May 20, 1968 had decided *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U.S. 308, holding that the First Amendment forbade the issuance of a state court injunction prohibiting as a trespass picketing at the premises of a store within a shopping center publicizing a union's labor dispute with the store.

The Supreme Court of Alabama affirmed the judgment of the Circuit Court (R. 125, *infra*, p. 22a).[2]

---

[2] The judgment below upholding the issuance of the injunction is clearly final for purposes of review by this Court both because the federal questions have been finally decided (*Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U.S. 308, 312-313, n. 5) and because a substantial claim of preemption of state court jurisdiction is made (*Local No. 438 Construction Union* v. *Curry*, 371 U.S. 542, 543-550, 552).

On the question of preemption of state court jurisdiction, the Supreme Court held that (R. 123, *infra*, pp. 20a-21a):

> The activity enjoined in the instant case is neither protected by § 7 nor prohibited by § 8 of the National Labor Relations Act. We are of opinion that it is not reasonably arguable that the Congress intended to exclude the states from jurisdiction over trespass by picketing on privately owned property, which does not have the quasi-public character of a town street or business block, in a manner so as to obstruct entrances to a store.

On the question of the constitutional protection of picketing as free speech, the Supreme Court held that (R. 123-124, *infra*, p. 21a):

> The respondents say, in their second particular, that the court erred in enjoining their union picketing activity because they have a constitutional right to picket peacefully as an exercise of freedom of speech. Without further lengthening this opinion, we hold that the court did not err in this respect because picketing involves something more than free speech, and because the right to picket must be balanced against the right of the owner to use his property in a lawful manner and the interest of the state in restraining trespass which is a potential cause of violence. So far as this record discloses, picketing on the streets abutting complainant's store lot is not materially less effective than picketing on the lot itself.

REASONS FOR GRANTING THE WRIT

I

The decision below is in conflict with, and should be summarily reversed on the authority of, this Court's decision in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308.

The essence of *Logan Valley* is that an employer who opens his property to the public—to customers in order to secure their patronage of his store and to others in the community in order to operate his store—cannot close his property to employees who seek by peaceful picketing in the immediate vicinity of the store to publicize the store's disfavored labor policy. The purported differences identified by the court below between *Logan Valley* and the instant situation emphasize the absence of a valid distinction.

1. The court below states that Weinacker's is a smaller shopping center than Logan Valley Plaza (R. 108, *infra*, p. 10a), and its parking lot, walkways and sidewalks do "not have the quasi-public character of a town street or business block . . ." (R. 123, 114-115, *infra*, pp. 20a-21a, 15a). The size of the enterprise is not the criterion, nor can property which has been opened to the public be deprived of its openness by declining to affix the label "quasi-public" to it. The relevant inquiry is whether peaceful picketing is "carried on in a location open generally to the public . . ." (391 U.S. at 313); as in *Logan Valley*, so here, the "general public has unrestricted access to the mall property" (*id.* at 318); and so here, no less than in *Logan Valley*, as the property "'is freely accessible and open to the people in the area and those passing through.' . . . the State may not delegate the power,

through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put" (*id.* at 319-320).

Indeed, this case may be considered *a fortiori* to *Logan Valley*. The picketing in *Logan Valley* was stranger picketing conducted by nonemployees to inform the public of the nonunion character of the store. 391 U.S. at 314-315. The picketing in this case supported a strike by the store's own employees to obtain a collective bargaining agreement after negotiations with their employer by their union certified as their representative had failed (*supra*, pp. 8, 11).[3] These employees are not trespassers when, in order to work for Weinacker's, they park their car on its lot and tread its walkways and sidewalks to get into its store. These same employees do not become trespassers when, in order to obtain acceptable employment terms for their work in that store, they picket on the same sidewalks near the entrance to the same store to support their demands. And so, even more than in *Logan Valley*, the picketing was "directly related" to the store; it was conducted on the publicly-used premises in the immediate vicinity of the store; and the store owner should not "be permitted to avoid this incidence of carrying on a public business in the name of 'private property.'" 391 U.S. at 325-326 (Mr. Justice Douglas concurring).

---

[3] This is a minimum statement of the nexus of the picketing to the dispute it publicized. The Union averred that Weinacker's refusal to bargain in good faith "led to" the strike (*supra*, p. 8), and the NLRB later found that Weinacker's had refused to bargain in good faith with the Union (*supra*, p. 10).

Nor can it make a difference, as the court below seemingly suggests, that "the trespass is on the premises of a single store owner . . ." (R. 112, *infra*, p. 14a). What matters is whether the property has been opened to the public, not whether there is one or more than one owner.

2. The court below states that "picketing involves something more than free speech . . ." (R. 123, *infra*, p. 21a). But it also involved something more than pure speech in *Logan Valley*. The speech-plus aspect of picketing pertains to its character as a physical patrol and authorizes placing a "limit [on] the location and manner of the picketing or the number of picketers" in the vicinity of the store's entrance; it does not authorize a ban by which the picketing is "prohibited absolutely" in that vicinity. 391 U.S. at 321. The "mere fact that speech is accompanied by conduct does not mean that the speech can be suppressed under the guise of prohibiting the conduct." *Id.* at 323. Nor can the court below justify the suppression on the ground that picketing on privately-owned but publicly-used premises "is a potential cause of violence" (R. 123, 115, *infra*, pp. 21a, 15a-16a). This chimera of potential violence was identically present in *Logan Valley*, and it is as unavailing here, as it was in *Logan Valley*, to justify suppression of picketing—"protected by the First Amendment" (391 U.S. at 313)[1]—in the vicinity of the store.

3. The court below states that in this case, unlike *Logan Valley*, the picketing was conducted "in a man-

---

[1] "[O]ur decisions have also made clear that picketing and parading may nonetheless constitute methods of expression, entitled to First Amendment protection." *Shuttlesworth* v. *City of Birmingham*, 39 U.S. Law Week 4203, 4204 (S. Ct. March 10, 1969).

ner so as to obstruct entrances to the store" (R. 123, 107, 108, 112, 115, *infra*, pp. 21a, 10a, 11a, 14a, 15a). But the unchallenged parts of the injunction in *Logan Valley* prohibited "blocking access by anyone to respondents' premises, making any threats or using any violence against customers, employees, and suppliers of Weis, and physically interfering with the performance by Weis employees of their duties." 391 U.S. at 312, n. 4, 321, n. 10, 323, n. 13. Accordingly, in this case as in *Logan Valley*, obstructive picketing, if any existed,[5] would entitle a state court "to limit the location and manner of the picketing or the number of picketers within the mall in order to prevent in-

---

[5] The sole evidence to support the finding of obstructive picketing are six conclusory and identically-worded affidavits averring trespass "to the extent of obstructing the customers in entering and leaving the door of Weinacker's" and "carrying signs in such a way as to interfere with business . . ." (*supra*, p. 5). These affidavits were used to support the issuance of the *ex parte* injunction barring all access to the premises, an injunction issued with no notice or opportunity of any kind to be heard. As was explained concerning the evil causing enactment of the Norris-LaGuardia Act, "The first knowledge which the defendant has is service of notice upon him that the restraining order has already been issued. Before he is given an opportunity to be heard, he is enjoined . . . ." S. Rep. No. 163, 72d Cong., 1st Sess., 8. There "is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." *Carroll v. President and Commissioners of Princess Anne*, 37 U.S. Law Week 4041, 4042 (S. Ct., Nov. 19, 1969). Furthermore, while the Union has repeatedly averred that its picketing was peaceful and nonobstructive (*supra*, pp. 8, 10), no evidentiary hearing to resolve the factual issue has ever been held. There is thus nothing of record on the question of obstructive picketing except conclusory and identically-worded affidavits. This method of handling facts in the area of First Amendment freedoms is procedurally fundamentally infirm. See, *Speiser v. Randall*, 357 U.S. 513, 520-529.

terference with either access to the market building or vehicular use of the parcel pickup area and parking lot." 391 U.S. at 321. But the courts below cannot in this case, any more than the Pennsylvania courts could in *Logan Valley*, invoke obstructive picketing to hold that "'picketing and trespassing' can be prohibited absolutely on . . . [Weinacker's] premises." *Ibid.* Obstructive picketing authorizes the elimination of the obstruction, not the elimination of picketing.

4. The court below states that "picketing on the streets abutting . . . [Weinacker's] store lot is not materially less effective than picketing on the lot itself" (R. 123-124, *infra*, p. 21a). This is neither relevant nor accurate. It is irrelevant because *Logan Valley* reiterates the teaching that "'[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'" 391 U.S. at 323-324. It is inaccurate because picketing on the public streets is screened from the store by the intercepting parking lot located in between. To confine the picketing to the public streets creates precisely that "*cordon sanitaire* of parking lots" around the store which *Logan Valley* condemns. 391 U.S. at 325. The immediate vicinity of the store is the natural and effective place to communicate the picket's message. The parking lot interposes a buffer between the communicant and his audience and therefore inescapably blunts the expression of First Amendment rights.

5. The court below states that the injunction barring picketing within Weinacker's premises is "'aimed narrowly at a trespass . . .'" (R. 107, 111, *infra*, pp. 10a, 13a). To label the injunction "narrow" does not

change its engulfing character. It works just the total exclusion from the premises, whether it be called regulation or suppression (391 U.S. at 321), which *Logan Valley* prohibits. Upon a proper showing of need an injunction may be narrowly drawn to control the number and location of pickets and the manner of picketing in the vicinity of the store. But to bar picketing altogether from the opened premises is the antithesis of a narrow injunction allowing picketing at the public place but circumspectly controlling its physical incidents.[6]

6. Accordingly, when the court below states, in support of the injunction, that "the right to picket must be balanced against the right of the owner to use his property in a lawful manner" (R. 123, *infra*, p. 21a), all that it in reality asserts is the "claimed absolute right under state law to prohibit any use of . . . [the owner's] property without . . . [its] consent" (391 U.S. at 324). But "Naked title" is no more available in this case than it was in *Logan Valley* to justify total exclusion from property opened to the public. *Ibid.*

Accordingly, the decision below in this case cannot stand compatibly with this Court's decision in *Logan Valley*. The decision below should therefore be sum-

---

[6] "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pinpointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental liberties when the end can be more narrowly achieved.' . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case." *Carroll* v. *President and Commissioners of Princess Anne*, 37 U.S. Law Week 4041, 4043 (S. Ct., Nov. 19, 1968).

narily reversed in order to put an abrupt end to experimentation with circumvention of the plain import of *Logan Valley*.

II

The second question presented is whether the determination of a dispute over whether or not picketing may be conducted on privately-owned but publicly-used property in the course of a labor dispute is initially within the sole competence of the NLRB. This Court in *Logan Valley* granted certiorari to review the question whether "the state courts were without jurisdiction . . . because the controversy involves issues that are within the exclusive jurisdiction of the National Labor Relations Board"; it did not reach the question because decision was based on First Amendment grounds. 391 U.S. at 309-310, n. 1. Demurring from predicating the decision on the First Amendment, and regretting that the pre-emption question had not been properly preserved, Mr. Justice Harlan observed that "it seems clear . . . that the petitioner has a substantial pre-emption claim." *Id.* at 333-334. Mr. Justices Black and White, while dissenting from the conclusion that the First Amendment had been violated, separately emphasized that they did not reach any issue under the National Labor Relations Act. *Id.* at 329, n. 3; 340. The NLRB in its amicus brief in *Logan Valley* expressed the view that to "subject the picketing here to State court jurisdiction would entail a real danger of creating the very conflicts and 'frustration of national purposes' which *Garmon* and the other preemption decisions of this Court have sought to avoid" (br. pp. 5-6, 13). In conflict with

the decision below, the Washington Supreme Court[7] and other courts[8] hold that the conduct is within the domain preempted by the NLRB. The preemption question was presented and decided at every stage of this case at *nisi prius* and on appeal. This Court should therefore settle finally this important and recurrent question on which a contrariety of judicial opinion continues to vex the administration of labor relations.

Constitutionality aside, the determination of the protection accorded and the restraint imposed on peaceful picketing in the context of a labor dispute is within the exclusive regulatory scope of the National Labor Relations Act and therefore within the field preempted by the NLRB. Section 7 of the Act guarantees to employees the right to engage in "concerted activities for the purpose of . . . mutual aid or protection. . . ." Peaceful picketing publicizing a lawful position is a preeminent expression of protected activity. "Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable." *N.L.R.B.* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 62. Thus, prohibition of secondary labor pressure carries the express reservation that nothing in that ban "shall be construed to make unlawful . . . any primary strike or primary

---

[7] *Freeman* v. *Retail Clerks Local No. 1207*, 58 Wash. 2d 426, 368 P. 2d 803.

[8] *Maryland* v. *Williams*, 44 LRRM 2357, 2362-64 (Md. Crim. Ct., June 10, 1965); *Weis Markets* v. *Retail Store Employees' Union, Local No. 692*, 66 LRRM 2166 (Md. Cir. Ct., August 18, 1967).

picketing." NLRA, § 8(b)(4)(B); *Steelworkers* v. *N.L.R.B.*, 376 U.S. 492, 498-499. Similarly, in regulating organizational and recognition picketing, Congress has with certain qualifications explicitly excepted from prohibitory reach "any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization. . . ." NLRA, § 8(b)(7)(C). In the absence of the "requisite clarity" this Court refused to read into the "congressional plan" a purpose "to proscribe all peaceful consumer picketing at secondary sites" aimed at the identified product of a disfavored firm. *N.L.R.B.* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 63. And so, unless clearly within the restraint which the Act itself imposes, "it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing." *Garner* v. *Teamsters*, 346 U.S. 485, 500. The scrupulousness of Congress and this Court reflects "concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." *N.L.R.B.* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 63.

It is therefore clear that a state court enters "the pre-empted domain of the National Labor Relations Board" insofar as it enjoin[s] . . . peaceful picketing. . . ." *Youngdahl* v. *Rainfair*, 355 U.S. 131, 139. The circumstance that peaceful picketing is conducted on the exterior grounds of the private but opened property of a store does not empower a state court to act. The propriety of labor activity on private property has been a persistent issue in disputes before the NLRB and its resolution "'belongs to the usual ad-

ministrative routine' of the Board."[9] In a variety of contexts private property has been required to yield to the statutory guaranty of protected concert.[10] "We have long passed the point where the bundle of property rights can be used arbitrarily or capriciously to restrict a worker's freedom of association or expression."[11]

Commitment of the question to initial determination by the NLRB is illustrated by that agency's court-approved rejection of a department store's claim that it could bar nonemployee organizers from soliciting union membership on a store-owned street open to the public. *Marshall Field & Co.*, 98 NLRB 88, 93, enforced as modified, 200 F. 2d 375 (C.A. 7). A large retail department store is bisected at ground level by a street owned by the store, known as Holden

---

[9] *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 130.

[10] In enforcing an NLRB order directing the employer to permit the union to conduct an independent time study within the plant, the Court of Appeals for the Second Circuit stated that: "Nor are we persuaded that the Board's decision unduly invaded the Company's property rights. In other circumstances, the courts have not hesitated to afford union representatives access to company premises in furtherance of the Act's purposes. See *N.L.R.B.* v. *Stowe Spinning Co.*, 336 U.S. 226 (1946) (union granted access to company town to hold organizational meeting); *N.L.R.B.* v. *Lake Superior Corp.*, 167 F. 2d 147 (6th Cir. 1948) (union granted access to company-owned logging camp to solicit membership); *N.L.R.B.* v. *Cities Service Oil Co.*, 122 F. 2d 149 (2d Cir. 1941) (union granted access to company ship to discuss grievances with unlicensed personnel)." *Fafnir Bearing Co.* v. *N.L.R.B.*, 362 F. 2d 716, 722 (C.A. 2). See also, *Interlake S.S. Co.*, 174 NLRB No. 55, 70 LRRM 1177 (access by union organizers to ship while crew is in port to solicit union adherence).

[11] *N.L.R.B.* v. *United Aircraft Corp.*, 324 F. 2d 128, 131 (C.A. 2), cert. denied, 376 U.S. 951.

Court, used by the store employees and the public to enter the building (98 NLRB at 93; 200 F. 2d at 377); "It is open to the public for pedestrian use" (98 NLRB at 93). The Court of Appeals for the Seventh Circuit enforced the NLRB's order requiring the store to permit nonemployee organizers to use Holden Court for union solicitation. The Seventh Circuit agreed that Holden Court "does partake of the nature of a city street, even though owned by the company" (200 F. 2d at 380), and its decree ordered the store to desist from "Prohibiting union organizers from soliciting on behalf of a union in petitioner's private street, known as Holden Court, where the employees involved are on non-working time" (200 F. 2d at 382).

Commitment of the question to initial determination by the NLRB is further illustrated by relating the situation to the standard expressed by this Court in *N.L.R.B.* v. *Babcock & Wilcox*, 351 U.S. 105. An employer may refuse to permit distribution of union literature by nonemployee union organizers on a company-owned parking lot "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution." *Id.* at 112. Unlike the exterior grounds of a store, however, "the Babcock & Wilcox parking lot was not generally open to the public." *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local No. 31*, 40 Cal. Rep. 233, 394 P. 2d 921, 926. The public character of the store's exterior grounds is crucial. To prohibit peaceful picketing on otherwise open property is to hold that a "theoretical invasion"

of property suffices of itself to suppress speech at the natural and effective place of its communication (*id.* at 924). The *Babcock & Wilcox* standard supports no such result.[12] As the NLRB itself has observed, as part of its rationale to support its finding that a store owner committed an unfair labor practice "when it prohibited a union representative from entering its parking lot to solicit membership from its employees," the "parking lot was open to the public and employees." *Priced-Less Discount Foods*, 162 NLRB No. 75, 64 LRRM 1065.

Furthermore, banning peaceful picketing on otherwise open property implicates precisely that discrimination which the *Babcock & Wilcox* standard forbids. To permit entry to the property of every element of the public except that part of the community with a labor message directed at and adverse to the store is invidious. The Circuit Court justifies this discriminatory debarment on the explicit ground that, "where a store owner invites prospective customers to come to his store to trade and to park on his grounds, made available therefor while doing business with the store owner, the invitation is for one particular purpose, not for *any* purpose to the general public . . ." (*infra*, p. 26a). Conversely, therefore, it excludes other members of the public who by peaceful picketing "may

[12] In a decision adopted by the NLRB in the absence of exceptions to it, an NLRB Trial Examiner aptly articulated the rationale: "Respondent's parking lot . . . was open to and used by the public as well as by its employees. In fact, it was intended primarily for public use as an adjunct to the store. Having made the parking lot available to the public, Respondent may not interfere with its employees' organizational activities by unreasonably denying access to it by union organizers." *Arlan's Dept. Store of Charleston*, Case No. 9-CA-3308, sl. op. p. 10, May 25, 1965.

persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute" (*Thornhill* v. *Alabama*, 310 U.S. 88, 104). That differentiation makes the exercise of free speech the point of distinction in determining what part of the public to exclude from property otherwise generally open. The *Babcock & Wilcox* standard bars that discrimination.[13]

The specific enmeshment of the instant controversy in the work of the NLRB is particularly plain. The NLRB found that Weinacker's had engaged in massive unfair labor practices designed to thwart union organization culminating in its refusal to bargain in good faith with the Union when the employees nevertheless chose collective representation (*supra*, pp. 8-10). This finding of unfair labor practices is directly relevant to the question of entry on the exterior store grounds to picket. In determining whether or not to require an employer to permit access to its property by nonemployee union representatives, and in prescribing conditions for entry when required, the NLRB takes into account the employer's commission of unfair labor practices. Thus, in opening a store parking lot used

---

[13] A privately-owned meeting hall in a company town was ordered opened to a union upon the same terms extended to others where even-handed access to the hall had been denied the union. *N.L.R.B.* v. *Stowe Spinning Co.*, 336 U.S. 226. "'It is not every interference with property rights that is within the Fifth Amendment. . . .'" *Id.* at 232; *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 802, n. 8. In *Steelworkers* v. *N.L.R.B.*, 376 U.S. 492, in sustaining the contested picketing as primary and protected, this Court treated as irrelevant the fact that "the picketed gate . . . was located on property owned by New York Central Railroad and not upon property owned by the primary employer" (*id.* at 499).

by the public to entry by a nonemployee union organizer, the NLRB observed that the employer "had engaged in widespread unfair labor practices. . . ." *Priced-Less Discount Foods*, 162 NLRB No. 75, 64 LRRM 1065. Similarly, in opening to nonemployee union organizers for six months "access to [nonpublic] plant parking lots and plant approaches during nonworking time," the NLRB observed that the employer had "committed massive unfair labor practices which were, in substantial part, of a kind deliberately calculated to thwart the Union's attempts to communicate with employees through the usual channels." *Marlan Industries Corp.*, 166 NLRB No. 58, 65 LRRM 1626, 1632, enforced as modified, 70 LRRM 2472, 2474 (C.A. 6, Jan. 29, 1969). Whether or not the unfair labor practices committed by Weinacker's in this case are similarly relevant to the permissibility of picketing in the immediate vicinity of its store only the NLRB can initially say. A state court has no power to determine the existence of unfair labor practices or their relevance to access to property as a remedy.

In short, one function of the NLRB is to keep the channels of communication open and unobstructed, and in the discharge of that function appropriate access to property in order to reach the audience cannot "be defeated through the simple assertion . . . of a landlord's interest." *Harlan Fuel Co.*, 8 NLRB 25, 32. The NLRB is thus not ousted of its exclusive competence to determine initially any question concerning the statutory protection enjoyed by peaceful picketing conducted on the exterior grounds of the private but open property of a store. It is the NLRB's business in the first instance to accommodate a claimed collision between recourse to protected activity and the use of

private property. Peaceful picketing on the exterior grounds of a store is no exception. A state court retains the authority to control the physical incidents of picketing on those grounds but it has no power to bar picketing altogether because of private ownership.

Accordingly, apart from narrow state regulation of the physical incidents of picketing, the elements of the controversy place its determination within the sole jurisdiction of the NLRB. "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245. Heedless of this principle, the court below "entered the preempted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing by petitioner." *Youngdahl v. Rainfair*, 355 U.S. 131, 139.

III

While it would unhappily compel a return to "a now discarded approach to pre-emption" (*N.L.R.B. v. Insurance Agents' International Union*, 361 U.S. 477, 493, n. 23), a conclusion that the courts below are empowered to adjudicate the controversy presents for this Court's review the important question whether the state courts rightly determined that the "activity enjoined in the instant case is . . . [not] protected by § 7 . . . of the National Labor Relations Act" (R. 123, *infra*, p. 203). Peaceful picketing in support of a primary strike to secure improved employment terms is a preeminent expression of concerted activity for

mutual aid or protection. To screen the offending employer from picketing by interposing a parking lot between the workers and the situs of the dispute seriously weakens their ability to enlist public support to refrain from patronizing or serving the struck store, to dissuade employees from taking jobs at the struck store as strike replacements, and to maintain the strikers' own solidarity and morale. This divorcement of the picketing from the immediate vicinity of the store is especially detrimental in this case because it further dislocates the balance of economic power between the workers and the employer which the massive unfair labor practices committed by Weinacker's had already badly disjointed. And assuming, but not granting (*supra*, p. 18, n. 5), that obstructive picketing took place, this factor would authorize no more than an injunction narrowly drawn to reach only the physically obstructive aspects of the picketing (*Youngdahl* v. *Rainfair*, 355 U.S. 131, 137-140; *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 729-732), leaving its continuance at the situs of the dispute otherwise unmolested. Absolute exclusion of all picketing from the immediate vicinity of the store results therefore in state prohibition of the "'exercise of rights which the federal Acts protect.'" *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 75. Accordingly, in this case, as it did in *Logan Valley*, this Court should grant certiorari to review the question whether "the picketing herein was protected as a 'concerted activity for . . . mutual aid or protection' by § 7 of the National Labor Relations Act . . .". (391 U.S. at 309-310, n. 1).

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted. The judgment should be summarily reversed on the authority of *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U.S. 308. Alternatively, the cause should be set down for plenary briefing and argument.

Respectfully submitted,

S.G. Lippman
1741 DeSales Street, N.W.
Washington, D. C. 20036

Bernard Dunau
912 Dupont Circle
Building, N.W.
Washington, D. C. 20036

Otto E. Simon
James C. Wood
1010 Van Antwerp Building
Mobile, Alabama 36602

Attorneys for Petitioners

March 1969.

APPENDIX A

Opinion of the Supreme Court of Alabama

Filed September 19, 1968

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL SESSION, 1968

1 Div. 295

CLIFFORD TAGGART, ET AL.

v.

WEINACKER'S, INC., A CORP.

Appeal from Mobile Circuit Court, In Equity

COLEMAN, JUSTICE.

Respondents appeal from a decree denying their motion to dissolve a temporary injunction.

Complainant filed a verified bill of complaint averring that it possessed and operated a shopping center at the intersection of Government and Catherine streets in Mobile, and that the continuing trespass by respondents on complainant's lot deprived it of peaceful possession and caused it irreparable injury.

On a petition, treated as an amendment to the bill, the court granted a temporary injunction restraining the trespass.

Respondents filed a plea to the jurisdiction asserting that state court jurisdiction of the subject matter had been pre-empted by the National Labor Relations Act and that the National Labor Relations Board had taken jurisdiction of the dispute between these parties in proceedings filed by respondents with the Board, and that the Board

"7. The trial court's ruling of April 1, 1965 that the court had jurisdiction of the subject matter involved in the suit was contrary to the law of this cause. (Transcript pg. 82).

"

"10. The order of the trial court on April 4, 1965 holding that the primary jurisdiction of the subject matter in dispute had not been pre-empted by the National Labor Relations Board and denying the Respondents' Motion to Dissolve the Writ of Temporary Injunction and to Dismiss the Complainants' (sic) Verified Bill and Petition was contrary to the law in this cause. (Transcript pg. 82)."

Complainant argues that assignment 2 is bad because it fails to show how or in what way the court erred. We are not inclined to agree with this argument. The assignment says the court erred in overruling respondents' plea to the jurisdiction. This shows how the court erred.

Complainant says assignment 7 and 10 are bad and complainant is probably correct. These assignments do not assert that the court erred and merely say that the ruling was contrary to law. *National Association For The Advancement of Colored People v. State*, supra, and *Andrews v. May*, 277 Ala. 248, 249, [1], 168 So. 2d 619.

Even if assignments 2, 7, and 10 are bad, however, all the assignments in this group are related because they are governed by the same legal principles and argument, to wit, that the trial court had been divested of jurisdiction because the National Labor Relations Act had pre-empted jurisdiction of the subject matter of the suit. Assignments 3 and 4 appear to be good assignments and we will consider them, although other related assignments argued in the group are bad. *Gilliland & Echols Farm Supply & Hatchery v. Credit Equipment Corp.*, supra.

In the second group of assignments, which are argued together, is assignment 1 which recites:

> "1. The trial court erred in issuing a Writ of Injunction on January 22, 1965. (Transcript pg. 14)."

The order of January 22, 1963, was made without the hearing provided for by § 1054, Title 7, Code 1940. "No appeal lies from the order granting the injunction unless the order is shown by the record to have been made, or purports to have been made, after a hearing as provided by § 1054, Title 7, Code 1940 (§ 8304, Code 1923). *Berman v. Wreck-A-Pair Building Co.*, 234 Ala. 293, 297, 175 So. 269. The order of January 22, 1965, granting the injunction will not support an appeal.

In an appeal involving a similar order granting a temporary injunction without a hearing as provided by § 1054, Title 7, this court said:

> "In our opinion, the assignments of error which challenge the decree of March 19, 1960, in so far as it orders the issuance of a temporary injunction present nothing for our review, for an appeal does not lie from an order or decree granting a temporary injunction unless the record shows that the order or decree was made or purported to be made after a hearing as provided by § 1054, Title 7, Code 1940. (Citations Omitted)

> "The appellant's remedy in regard to the temporary injunction was by way of motion to dissolve under the provisions of § 1052, Title 7, Code 1940, and if the ruling was adverse to appeal therefrom as provided by § 757, Title 7, Code 1940." *Brooks v. Everett*, 271 Ala. 380, 384, 124 So. 2d 100.

See also: *WGOK, Inc. v. WMOZ, Inc.*, 275 Ala. 264, 265, 154 So. 2d 22.

Complainant says that assignment 1 presents nothing for review. We agree.

Complainant says further that because assignment 1 presents nothing for review and is argued in bulk together with assignments 5, 6, 8, and 9, none of the assignments argued in bulk in this group are to be considered.

We are of opinion that all assignments in the second group are related because they depend upon the same legal principles and argument, to wit, that the First and Fourteenth Amendments to the Constitution of the United States do not permit the state to enjoin respondents from picketing on complainant's property, and, therefore, that the court erred in denying the motion to dissolve. Assignment 8 recites:

> "8. The trial court erred in its order of April 1, 1965 denying the Respondents' Motion to Dissolve the Writ of Temporary Injunction and to Dismiss the Complainants' (sic) Verified Bill and Petition. (Transcript pg. 82)."

Assignment 8 asserts that the court erred and states how the court erred. We think it has not been shown that this is a bad assignment, and we will consider it.

For these reasons, the motion to affirm is overruled.

On the Merits.

Respondents argue that the trial court erred in two particulars, first, in determining that it had jurisdiction of the subject matter of the suit.

In support of this argument, respondents cite a number of decisions which hold that under the Labor Management Relations Act as amended, U.S.C.A., Title 29, § 141, et seq., state courts are excluded from jurisdiction over peaceful picketing and that exclusive jurisdiction has been conferred on the National Labor Relations Board. Re-

spondents say that the concerted activity of picketing is subject to control and regulation by the Board, that the Board has assumed jurisdiction of the dispute between these parties in other particulars, and that complainant's only remedy is by bringing the subject matter of the instant suit to the attention of the Board, which has not expressly declined jurisdiction over the activity here enjoined.

In support of this contention, respondents cite *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 3 L. ed 2d 775, 79 S. Ct. 773, in which the court undertook to state the rule of federal pre-emption as follows:

> ". . . . When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. (Citation Omitted) Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.
>
> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. . . . .
>
> ". . . . . .

". . . . When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted. (Citation Omitted)" (3 L. ed 2d at pages 782 and 783)

The last cited case was the second appeal to the United States Supreme Court in the same lawsuit. In the first appeal, 353 U.S. 26, 1 L. ed 2d 618, 77 S. Ct. 607, 609, the court had vacated the judgment of a state court enjoining peaceful picketing of a retail lumber yard. As we understand the opinion on second appeal in 3 L. ed 2d at page 784, the court held that because the ". . . . National Labor Relations Board has not adjudicated the status of the conduct for which the State . . . . seeks to give a remedy in damages, and since such activity is arguably within the compass of § 7 or § 8 of the Act, the State's jurisdiction is displaced."

In opinion on first appeal in 1 L. ed 2d, the court vacated the injunction on authority of two other cases decided the same day; i. e., *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, 1 L. ed 2d 601, 77 S. Ct. 598, 609, and *Amalgamated Meat Cutters* v. *Fairlawn Meats*, 353 U.S. 20, 1 L. ed 2d 613, 77 S. Ct. 604.

In *Guss*, the National Board had declined jurisdiction of charges of unfair labor practices brought by the union against an employer. The National Board declined to act, but did not cede jurisdiction to the state agency as authorized by § 10(a) of the National Act. The union filed the same charges with the Utah Labor Relations Board which found that it had jurisdiction and granted relief. When the case reached the United States Supreme Court, that court held that the proviso to § 10(a) is the exclusive means whereby states may be enabled to act concerning the matters which Congress has entrusted to the National

Board: that the activity complained of was an unfair labor practice under the National Act; that, although the National Board had declined to act, it had not ceded jurisdiction in the only authorized way; and, therefore, the state agency was powerless to act.

In *Fairlawn*, a state court enjoined the union from picketing the premises of an employer who operated three meat markets in separated localities, from trespassing upon the employer's premises, and from exerting secondary pressure on the suppliers of the employer. The United States Supreme Court assumed that ". . . . it was obvious that the Board would decline jurisdiction." 1 L. ed 2d at page 615. The writer of the Summary, at page 601 in 1 L. ed 2d, states that the court vacated the judgment granting the injunction on the ground that even if the National Board would obviously decline jurisdiction, the state court had no power to enjoin the union conduct involved because it was of that kind regulated by the National Board. The concluding paragraph of the court's opinion recites:

> "One final point remains to be considered. At two of respondent's stores, located in suburban shopping centers, the picketing occurred on land owned by or leased to respondent, though open to the public for access to the stores. As one of the reasons for finding the picketing unlawful, the Court of Appeals recited this fact; and 'trespassing upon plaintiff's property' is one of the activities specifically enjoined. Whether a State may frame and enforce an injunction aimed narrowly at a trespass of this sort is a question that is not here. Here the unitary judgment of the Ohio court was based on the erroneous premise that it had power to reach the union's conduct in its entirety. Whether its conclusion as to the mere act of trespass would have been the same outside the context of petitioner's other conduct we cannot know. The judgment

therefore is vacated and the case remanded for proceedings not inconsistent with this opinion." (1 L. ed 2d at pages 616 and 617)

The instant injunction is ". . . . aimed narrowly at a trespass of this sort . . . ." and the question not presented in *Fairlawn* is presented here. Moreover, as we understand *Fairlawn*, the opinion does not indicate that the picketing on employer's property was carried on in such a manner as to obstruct the customers of the complainant in entering and leaving entrances to the store building.

In a recent case, *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza*, —— U.S. ——, 20 L. ed 2d 603, 88 S. Ct. ——, decided May 20, 1968, the court reversed a judgment of the Supreme Court of Pennsylvania enjoining peaceful picketing in a shopping center. The United States Supreme Court said:

> ". . . . All we decide here is that because the shopping center serves as the community business block 'and is freely accessible and open to the people in the area and those passing through,' March v. Alabama, 326 US, at 508, 90 L Ed at 269, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put." (20 L. ed 2d at pages 612 and 613)

Although complainant avers in its bill that it operates "a shopping center," we do not think that the findings of the trial court justify the conclusion that complainant's premises are a shopping center such as the one in *Logan Plaza* where the perimeter of Logan Valley Mall was a little less than 1.1 miles; the Mall contained two commercial enterprises, Weis Markets and Sears, Roebuck and Co. at the time of trial; and fifteen other commercial es-

tablishments were situated in the shopping center when the opinion was delivered. See Note 8, 20 L. ed 2d 611. Neither do we understand that the trespass was such that the picketing obstructed customers entering or leaving the store.

In the case at bar, as we understand it, the correctness of the trial court's findings is not challenged. The court found:

> ". . . that a labor dispute exists between the Complainant, Weinacker's Inc., the employer, and the Respondents, Clifford Taggart, Riley Hobbs, James Stuckey and Retail Clerks Union, Local 458 of Mobile, that the Respondent, Retail Clerks Union, Local 458 of Mobile, of which the other Respondents are members, has been certified by the National Labor Relations Board as a bargaining representative for the employees of the Complainant, that numerous differences have existed and do now exist between the Complainant and parties Respondent over the matter of a collective bargaining agreement between them, and when contract negotiations broke down, the Respondent Union called a strike which is now in progress. Picket lines have been established by the Union on both of the public sidewalks of the City of Mobile immediately adjacent to the public streets and adjoining the real property of the Complainant on which its storebuilding is located and its business is conducted. Complainant, Weinacker's, Inc., conducts a general department store business for the sale of groceries, dry goods, hardware, drugs and prepared foods in a single building, which is set-back from the public street on the east and on the south, which building and premises are under the single ownership of the Complainant. The main entrance to said building fronts on the public street (Government Street) to the south. Across Catherine Street (a public street)

to the east. Complainant operates an automobile service station. South of the front of Complainant's storebuilding and between it and the public street, complainant maintains a motor vehicle parking area for the use and convenience of its customers in parking their automobiles while in and about their business with the Complainant, and Complainant also maintains private walkways over its premises leading up to its storebuilding, and sidewalks around its storebuilding. Picketing was first carried on by the Respondents on the public sidewalks of the City of Mobile and later on the sidewalks on the Complainant's premises and in front of the entrances to Complainant's storebuilding. While this picketing on Complainant's premises and in front of the entrances to its building has been without any acts of actual violence or threats of violence to any persons, it has been carried on in such a manner as to obstruct the customers of the Complainant in entering and leaving the entrances to said building on the south or Government Street side thereof. Said picketing in the manner heretofore described continued after the Complainant, through one of its officials, had requested the Respondents not to trespass on Company premises; however, in obedience to the Writ of Temporary Injunction, the Respondents have confined their picketing of Complainant's premises to the public sidewalks of the City of Mobile adjoining the same. This Court's Writ of Temporary Injunction restrained and enjoined the Respondents, their agents, servants, employees and any and all persons acting in concert with them from trespassing upon the real property of the Complainant and from interferring (sic) with its property and the right of ingress and egress thereto."

In support of their contentions, respondents cite the following cases which we here number for reference below:

(1) *Toomer* v. *Local No. 995, IBEW*, (La. App.), 131 So. 2d 248; (2) *Barksdale and LeBlanc* v. *Local No. 130, IBEW*, (La. App.), 143 So. 2d 770; (3) *Broadcast Service of Mobile, Inc.* v. *Local 1264, IBEW*, 276 Ala. 93, 159 So. 2d 452; (4) *Maryland* v. *Williams*, 44 LRRM 2357, 37 Labor Cases, ¶ 65,708; (5) *Marsh* v. *Alabama*, 326 U.S. 501, 90 L. ed 265, 66 S. Ct. 276; (6) *Freeman* v. *Retail Clerks Union*, 58 Wash. 2d 426, 363 P. 2d 803; (7) *Schwartz-Torrance Investment Corp.* v. *Bakery & Confectionery Workers' Union*, 40 Cal. Rptr. 233, 394 P. 2d 921.

Three elements exist in the instant case to distinguish it from the cited cases; to wit, here, the injunction is sought and granted so that the trespass is narrowly enjoined;[1]

---

[1] The petition for immediate relief recites:

"O N E

"On January 21, 1965 this Honorable Court issued a fiat to the named Respondents ordering the request for an injunction to be set for a hearing at 9:30 Monday, January 25, 1965.

"T W O

"After receiving this notice actual or constructive, the Respondents [Clifford Taggart & Riley Hobbs (in ink)] have proceeded to constantly trespass upon the Complainant's property by marching or parading back and forth to the immediate doorway of the Complainant's place of business. Your Petitioner alleges that this conduct has been more intensive since the Court entertained the Complainant's petition and set the cause for hearing as described above and that such action on the part of the Respondents are at this time causing an irreparable injury to the Complainant in that the actions of the Respondents constitute obstructing customers from entering and leaving the Complainant's place of business and the Complainant alleges that the acts are outside the realms of peaceful picketing and constitute an immediate invasion of his property and his property rights contrary to the laws of the State of Alabama and the Constitution of the United States of America.

"T H R E E

"Your Complainant alleges that it is necessary to receive immediate injunctive relief to enjoin the continuous obstruct-

the trespass is on the premises of a single store owner; and the trespass obstructed customers using the entrances to the store. In none of the cited cases is the injunction so narrowly sought or granted.

In (1), the opinion indicated that the only witness testifying as to obstruction of access to the job site said that "his way was not blocked." 131 So. 2d at 252. In (2), it appears that there was no obstruction of entrances.

---

ing of the doorway to the Complainant's shopping center and that the Petitioner has no adequate remedy at law other than the facilities of this Honorable Court by enjoining the Respondents from such acts.

"FOUR

"Your Complainant respectfully prays that this Honorable Court issue a temporary writ of injunction after requiring the Complainant to enter into a bond with good and sufficient sureties as required by this Honorable Court.

"WHEREFORE, your Petitioner respectfully prays that the allegations of the Petition filed in this Court in this original cause as of January 21, 1965 be adopted and made a part hereof and that this Honorable Court forthwith order the Respondents and agents, servants or employees [and any and all persons acting in concert with (in ink)] from trespassing upon the property of the Complainant and from further interfering with the Complainant's property and right of ingress and egress to the Complainant's property and place of business and grant unto the Complainant all other fit and proper relief that the Complainant might be entitled to and shows unto the Court that an irreparable injury will result unless this Honorable Court grant the relief as so prayed."

The command of the writ of injunction is:

"These, therefore, are to COMMAND AND STRICTLY ENJOIN you, and each of you, from—TRESPASSING UPON THE PROPERTY OF THE COMPLAINANT AND FROM FURTHER INTERFERING WITH THE COMPLAINANT'S PROPERTY AND RIGHT OF INGRESS AND EGRESS TO THE COMPLAINANT'S PROPERTY AND PLACE OF BUSINESS until the further orders of this Court. And this you will in no wise omit under penalty, &c."

and the picketing was not on property owned by or under control of the plaintiffs, and this is the case also in (3). In (4), the picketing was on the walkways of a shopping center which covered 46 acres with over 50 tenants, and picketing did not obstruct entrances. In (5), the activity was on the sidewalk of a company town and no obstruction was involved. In (6), the picketing was in a shopping center in which there were "numerous stores, banks and other enterprises," 363 P. 2d 803. Apparently the picketing was on the shopping center street and no entrance was obstructed. In (7), picketing was on sidewalks in a shopping center, and, also, so far as appears, without obstruction of entrances.

The court seems to justify the decision in *Logan Valley Plaza* on the conclusion that the shopping center streets had become quasi-public streets and the pickets would be disadvantaged if confined to the public streets outside the Mall. The premises of the instant complainant are not shown to have acquired the character of a town or business block as in *Marsh* and disadvantage to the pickets is not shown. Moreover, obstruction of customers using store entrances is present here but not in the cases cited by respondents.

It would be tempting to dispose of this case by saying that, because no person has suffered bodily assault or injury as a result of the activity here enjoined, the state court has no jurisdiction, but it appears to be our duty to dispose of the case the hard way as the reader of this opinion must have realized by now.

It is true that the evidence does not show that a blow has been struck or any blood shed, and, by some standards, the trespass or picketing may be described, perhaps correctly, as peaceful. The obstruction of a person's use of an entrance to a building by the presence of another person, however, can be accomplished only by using, or

threatening to use, physical force in some degree, large or small, depending on the restraint with which the persons involved govern their actions. Such obstruction can easily and quickly escalate into an affray which, even in the loose meaning of today's popular speech, cannot be properly called a peaceful affair.

Aside from the threat of violence which may be provoked by obstructing entrances, two cases support the conclusion that state jurisdiction over the trespass here enjoined has not been ousted. In *Moreland Corp. v. Retail Store Employees Union*, 16 Wis. 2d 499, 114 N. W. 2d 876, decided in 1962, the owner of a shopping center sought an injunction against picketing on a sidewalk in a shopping center. In deciding the issue of jurisdiction, the court said:

> ". . . . Even assuming the presence of the necessary federal jurisdictional requirements, the question of whether a state court may enjoin picketing as a trespass, in spite of arguable federal labor law pre-emption in other respects, has been expressly left open by the United States supreme court. *Amalgamated Meat Cutters & Butcher Workmen, Local No. 427, A.F.L. v. Fairlawn Meats, Inc.* (1957), 353 U.S. 20, 77 Sup. Ct. 604, 1 L. Ed. (2d) 613. We conclude that the courts of Wisconsin do have subject-matter jurisdiction to determine a controversy involving an alleged trespass by agents of a labor union. . . . .
>
> ". . . . . .
>
> "The issue is whether the respondent, because it has designed its private property for use as a shopping center, has lost its right to ban otherwise lawful picketing. If the record before us clearly established that the property involved is a multistore shopping center, with sidewalks simulated so as to appear to be public in nature, we would have no difficulty in reaching a

conclusion that the property rights of the shopping-center owner must yield to the rights of freedom of speech and communication which attend peaceful picketing. See *Freeman* v. *Retail Clerks Union Local No. 1207, supra* (concurring opinion). See also Notes, 19 Duke Law Journal, 310; Note, 73 Harvard Law Review, 1216, and Note, 10 Stanford Law Review, 694. Compare, *Marsh* v. *Alabama* (1946), 326 U.S. 501, 66 Sup. Ct. 276, 90 L. Ed. 265, in which the United States supreme court held that the freedom of religion guaranteed by the First and Fourteenth amendments prevented the enforcement of a criminal-trespass statute against a person distributing religious pamphlets on the sidewalk of a company-owned town. See also *National L. R. Board* v. *Babcock & Wilcox Co.* (1956), 351 U.S. 105, 76 Sup. Ct. 679, 100 L. Ed. 975, a decision under the National Labor Management Relations Act involving the right of labor union representatives to circulate literature in an employer's private parking lot. . . . .

"In weighing the parties' conflicting interests of private property and free speech, we would want to know the physical characteristics of the shopping center so that our decision on this important policy question could be applied with clarity to other disputes which might arise. On the record before us, the precise nature of the shopping center is not fully disclosed. There are *some* details in the pleadings and in the affidavits; also, the photograph of the store in question is in the record. However, we conclude that the record presents an insufficient basis upon which to enter a summary judgment for the appellants. There being material facts in issue which necessitate a trial, the trial court properly denied the appellants' motion for summary judgment." (16 Wis. 2d at pages 503, 505, and 506)

Moreland is cited by the Supreme Court of the United States in Note 15 of the opinion to support the conclusion of the court in *Logan Valley Plaza*.

In *Hood v. Stafford*, 213 Tenn. 684, 278 S. W. 2d 766, decided in 1964, there was a history of proceedings before the National Labor Relations Board. The opinion recites:

> "Prior to the sale of the Weingarten stores, this union had sought to organize the employees of Pic-Pac. As a result of this effort, the National Labor Relations Board held an election on October 4, 1961 for the purpose of determining whether the employees of Pic-Pac desired the union to represent them as bargaining agent. At this election, 19 out of 90 votes cast were in favor of representation by the union. The election was contested and, as far as the record shows, that matter was still pending before the N.L.R.B., at the time of the trial of this case in the Circuit Court.
>
> "It further appears that there are also two other matters which at the time of trial were undisposed of before the N.L.R.B. One pertains to the dismissal on September 16, 1961 by Pic-Pac of two employees, and the other relates to Weingarten and its handling of the sale to Pic-Pac and its discharge of its employees. Unfair labor practice charges were filed by Pic-Pac with the N.L.R.B., with reference to the activity in question in this case. These charges were dismissed by the Board and no complaint was issued." (378 S. W. 2d at pages 767 and 768)

A picket had been arrested and convicted for violating a city ordinance by her picketing which is described as follows:

> "The defendant and other pickets were on the parking area of the Pic-Pac Store at Highland and Summer,

> They were wearing placards, distributing circulars, and soliciting prospective customers, seeking to persuade these members of the public not to trade with Pic-Pac. At times defendant and others walked back and forth in front of the door to the store, which defendant estimated to be 200 to 300 feet from the public sidewalk. At other times defendant was out in the parking area of the parking lot. The prosecutor testified that at times it was necessary for customers to step around the defendant and another picket in order to get in the door to the store. He stated that about one-third of those approaching the door turned away and did not enter the store after being approached by the defendant or another picket. The defendant stated she could not estimate the number of persons who turned around and left the premises as a result of her activities. She was asked to leave the premises before being arrested." (378 S. W. 2d at page 768)

The Tennessee Court held that state jurisdiction had not been ousted, saying, among other things:

> "Probably the most direct authority dealing with the questions presented in the petition for certiorari is People v. Godufo, 21 Ill. 2d 605, 174 N. E. 2d 385 (1961), in which the defendants were convicted in the Chicago Municipal Court of criminal trespass. The defendants entered the parking area of a Sears, Roebuck store for the purpose of distributing union leaflets and questionnaires to employees of the store. The superintendent asked them to leave the premises several times but defendants refused. He then had them arrested. The question of whether or not federal legislation had divested the state courts of power to deal with the activity involved was presented. The Supreme Court of Illinois affirmed the judgment of the Municipal Court. The United States Supreme Court denied certiorari without comment in 368 U.S.

927, 82 S. Ct. 361, 7 L. Ed. 2d 190. The Illinois Court, in that case, recognized that when an activity is protected by Section 7, or prohibited by Section 8, of the National Labor Relations Act, the state must abstain from regulation and, further, that when the activity is arguably subject to Section 7 or Section 8 of the Act, the states must yield to the primary jurisdiction of the National Labor Relations Board. The Court then stated:

> "'The defendants have made much of the fact that there was no violence in this case. We believe, however, that this was due to the fact that the company did not resort to self-help to remove defendants from the premises. The defendants were on property occupied by Sears, Roebuck and Company. The company's agent believing the defendants had no right to be on the property ordered them to leave three times. The defendants believing they had a right to be there refused to leave. At this point the company called the police. If the State had not taken charge of the situation, the company would have had no alternative but to forceably remove the defendants. We cannot know the amount of force that would have been necessary to remove them, but the threat of violence in such a situation is imminent. See e. g., Marshall Field & Co. v. National Labor Relations Board, 7 Cir., 200 F. 2d 375.
>
> "'.....'" (378 S. W. 2d at pages 769 and 770)

The activity enjoined in the instant case is neither protected by § 7 nor prohibited by § 8 of the National Labor Relations Act. We are of opinion that it is not reasonably arguable that the Congress intended to exclude the states from jurisdiction over trespass by picketing on privately owned property, which does not have the quasi-public

character of a town street or business block, in a manner so as to obstruct entrances to a store.

We hold that the trial court in the instant case did not err in deciding that it had jurisdiction.

The respondents say, in their second particular, that the court erred in enjoining their union picketing activity because they have a constitutional right to picket peacefully as an exercise of freedom of speech. Without further lengthening this opinion, we hold that the court did not err in this respect because picketing involves something more than free speech, and because the right to picket must be balanced against the right of the owner to use his property in a lawful manner and the interest of the state in restraining trespass which is a potential cause of violence. So far as this record discloses, picketing on the streets abutting complainant's store lot is not materially less effective than picketing on the lot itself.

AFFIRMED.

Livingston, C. J., and Simpson and Kohn, JJ., concur.

APPENDIX B

Judgment of the Supreme Court of Alabama

SUPREME COURT OF ALABAMA —THURSDAY, SEPTEMBER 19, 1968

THE COURT MET IN SPECIAL SESSION PURSUANT TO ADJOURNMENT

PRESENT: CHIEF JUSTICE LIVINGSTON AND ASSOCIATE JUSTICES LAWSON, SIMPSON, MERRILL, COLEMAN AND HARWOOD. ASSOCIATE JUSTICE KOHN NOT PRESENT.

1st Div. 295

CLIFFORD TAGGART, ET AL.

v.

WEINACKER'S, INC., a Corp.

MOBILE CIRCUIT COURT, IN EQUITY

Come the parties by attorneys and the record and matters therein assigned for errors being argued and submitted on motion and merits and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the decree of the Circuit Court be in all things affirmed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the appellants, Clifford E. Taggart and Retail Clerks' Union Local No. 458, and Reliance Insurance Company, surety for the costs of appeal, pay the costs accruing on said appeal in this Court and in the Court below, for which costs let execution issue.

APPENDIX C

Opinion and Judgment of the Circuit Court of Mobile County, Alabama, in Equity

ORDER OF COURT

THIS CAUSE BEING FIRST DULY SET CAME ON TO BE HEARD by the Court on the 26th day of March, 1965, on the Respondents' Motion to Dissolve the Temporary Writ of Injunction heretofore issued by the Court and to Dismiss Complainant's Bill, and was submitted at the conclusion of the hearing, on Complainant's Verified Bill of Complaint and Verified Petition for Immediate Injunctive Relief, together with the thereto attached affidavits, and the Respondents' Verified Answer thereto and Motion to Dissolve the Temporary Injunction and to Dismiss said Bill and Petition, and the Court having fully considered the matter, finds that a labor dispute exists between the Complainant, Weinacker's Inc., the employer, and the Respondents, Clifford Taggart, Riley Hobbs, James Stuckey and Retail Clerks Union, Local 458 of Mobile, that the Respondent, Retail Clerks Union, Local 458 of Mobile, of which the other Respondents are members, has been certified by the National Labor Relations Board as a bargaining representative for the employees of the Complainant, that numerous differences have existed and do now exist between the Complainant and parties Respondent over the matter of a collective bargaining agreement between them, and when contract negotiations broke down, the Respondent Union called a strike which is now in progress. Picket lines have been established by the Union on both of the public sidewalks of the City of Mobile immediately adjacent to the public streets and adjoining the real property of the Complainant on which its storebuilding is located and its business is conducted. Complainant, Weinacker's, Inc., conducts a general department store business for the sale of groceries, dry goods, hardware, drugs and prepared foods in a single building, which is set-back from the public

street on the east and on the south, which building and premises are under the single ownership of the Complainant. The main entrance to said building fronts on the public street (Government Street) to the south. Across Catherine Street (a public street) to the east, Complainant operates an automobile service station. South of the front of Complainant's storebuilding and between it and the public street, complainant maintains a motor vehicle parking area for the use and convenience of its customers in parking their automobiles while in and about their business with the Complainant, and Complainant also maintains private walkways over its premises leading up to its storebuilding, and sidewalks around its storebuilding. Picketing was first carried on by the Respondents on the public sidewalks of the City of Mobile and later on the sidewalks on the Complainant's premises and in front of the entrances to Complainant's storebuilding. While this picketing on Complainant's premises and in front of the entrances to its building has been without any acts of actual violence or threats of violence to any persons, it has been carried on in such a manner as to obstruct the customers of the Complainant in entering and leaving the entrances to said building on the south or Government Street side thereof. Said picketing in the manner heretofore described continued after the Complainant, through one of its officials, had requested the Respondents not to trespass on Company premises; however, in obedience to the Writ of Temporary Injunction, the Respondents have confined their picketing of Complainant's premises to the public sidewalks of the City of Mobile adjoining the same. This Court's Writ of Temporary Injunction restrained and enjoined the Respondents, their agents, servants, employees and any and all persons acting in concert with them from trespassing upon the real property of the Complainant and from interfering with its property and the right of ingress and egress thereto.

Upon the Court's hearing of the Motion to Dissolve and the Temporary Injunction and to Dismiss Complainant's Bill of Complaint and Petition, the Respondents contended that the picketing in question on Complainant's real property arose out of and is the subject of a labor dispute existing between the Complainant and the Respondents and that by reason thereof, the National Labor Relations Board has sole jurisdiction of the subject matter in controversy, that is, to determine the right to peacefully picket, or, not right to peacefully picket on Complainant's premises, to the exclusion of the jurisdiction of the State Courts, because Congress, by the passage of the National Labor Relations Act, as amended, 29 USC, Section 151 et seq., has pre-empted the State Courts' jurisdiction and vested it in the National Labor Relations Board, and also that the Respondents are within their legal rights in peacefully picketing Complainants place of business by going on its property and on to the sidewalks of the Complainant, because this activity is protected by said Labor-Management Relations Act, as amended, 29 USC, Section 141, et seq., and the First and Fourteenth Amendments to the Constitution of the United States.

Complainant contends that, notwithstanding no affrays have occurred, the Respondents have committed actual trespass on Complainant's private property and that their acts generate actual violence and are in violation of both the civil and criminal laws of this State, and hence, cannot be carried on in a peaceful atmosphere or surrounding, and also, that while picketing may be carried on for a lawful purpose, such may not be done in an unlawful manner.

Therefore, the first question in this case is whether or not the State Courts have jurisdiction to hear it. And, the second question is whether or not, if the State Courts do have jurisdiction of the subject matter, the Respondents' activities, complained of by the Complainant, are the subject of injunctive relief.

This Court has read the briefs submitted by counsel for the respective parties and the reported decisions contained therein and having fully understood and considered the matter, the Court is of the opinion and recognizes that when the activity is arguably subject to Section 7 and 8 of the National Labor Relations Act, the State Court is divested of jurisdiction and must yield to the primary jurisdiction of the National Labor Relations Board, and, generally, the "Pre-emption Doctrine" to bar actions by State Courts under State law is applied where peaceful picketing is carried on on a public street on a privately owned street or parking area which has lost its identity as such and partakes "of the nature of a city street".

But, where a storeowner invites prospective customers to come to his store to trade and to park on his grounds made available therefor while doing business with the storeowner, the invitation is for one particular purpose, not for *any* purpose to the general public, and the use of the storeowner's parking lot and sidewalks is of a purely private character over which the State Courts retain jurisdiction to hear suits seeking injunctive relief to bar trespassing. Hood vs. Stafford, 378 SW 2nd, 766.

The Court is of the further opinion that under the facts of this case, it was unlawful for the Respondents to trespass on the Complainant's premises by picketing, after being requested to leave. Freedom of speech, guaranteed to the Respondents by the First and Fourteenth Amendments to the Federal Constitution, did not give them the right to remain on the parking area and sidewalks of the Complainant after they were ordered to leave.

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED by the Court that this Court does have jurisdiction of the subject matter involved in this suit which has not been divested by the National Labor Relations Act.

It Is Further Ordered, Adjudged and Decreed by the Court that the Respondents, by going on the Complainant's premises for the purpose of picketing the Complainant's storebuilding, were trespassers, and were employing an unlawful means of exercising their right to picket and that their activity in this respect is subject to injunctive relief by a State Court of Equity.

It Is Further Ordered, Adjudged and Decreed by the Court that Respondents' Motion to Dissolve the Writ of Temporary Injunction heretofore issued by this Court and to Dismiss the Complainant's Verified Bill and Petition be and the same is hereby denied.

It Is Further Ordered, Adjudged and Decreed by the Court that the Writ of Temporary Injunction heretofore issued by this Court be and the same is hereby continued until ordered dissolved by due process of law.

Ordered, Adjudged and Decreed at Mobile, Alabama, this 1st day of April, 1965.

Daniel T. McCall, Jr.
Judge

APPENDIX D

Writ of Injunction

CIRCUIT COURT OF MOBILE COUNTY

IN EQUITY

THE STATE OF ALABAMA /
MOBILE COUNTY /

To Any Sheriff of the State of Alabama Greeting:

WE COMMAND YOU, That, without delay, you execute this writ, and due return thereof how you have executed the same make to us.

To CLIFFORD TAGGART, RILEY HOBBS, JAMES SECKEY, INDIVIDUALLY & AS PRESIDENT OF RETAIL CLERKS' UNION, LOCAL 458 OF MOBILE; RETAIL CLERKS' UNION LOCAL 458 OF MOBILE.

WHEREAS WEINACKER'S INC., ETC. has this day filed its ORIGINAL Bill of Complaint in said Court against CLIFFORD TAGGART, RILEY HOBBS, JAMES SECKEY, INDIVIDUALLY & AS PRESIDENT OF RETAIL CLERKS' UNION, LOCAL 458 OF MOBILE, RETAIL CLERKS' UNION LOCAL 458 OF MOBILE praying, among other things, that THE ABOVE RESPONDENTS AND AGENTS, SERVANTS OR EMPLOYEES AND ANY AND ALL PERSONS ACTING IN CONCERT WITH BE RESTRAINED AND ENJOINED FROM TRESPASSING UPON THE PROPERTY OF THE COMPLAINANT AND FROM FURTHER INTERFERING WITH THE COMPLAINANT'S PROPERTY AND RIGHT OF INGRESS TO THE COMPLAINANT'S PROPERTY AND PLACE OF BUSINESS.

AND WHEREAS, on said Bill being exhibited to the Hon. DAN T. MCCALL, JR. a Judge of the Circuit Court of Mobile County, Alabama, on the 22nd day of January A.D., 1965, he did order that upon Complainants entering into Bond with security in the sum of TWO THOUSAND & no 100 ($2,000.00) — Dollars, payable to and approved by the Register of this Court, and conditioned according to law, a Writ of Injunction issue out of said Court according to

the prayer of said Bill: And Whereas bond has been given and approved as required by said order.

These, therefore, are to COMMAND AND STRICTLY ENJOIN you, and each of you, from TRESPASSING UPON THE PROPERTY OF THE COMPLAINANT AND FROM FURTHER INTERFERING WITH THE COMPLAINANT'S PROPERTY AND RIGHT OF INGRESS AND EGRESS TO THE COMPLAINANT'S PROPERTY AND PLACE OF BUSINESS, until the further orders of this Court. And this you will in no wise omit under penalty, &c.

WITNESS, W. Elsworth Hathorn, Register of the Circuit Court of Mobile County, Alabama, Equity Side, this 22nd day of January A.D. 1965.

W. ELSWORTH HATHORN
Register of the Circuit Court
of Mobile County, Alabama

APPENDIX E

Relevant Provisions of the National Labor Relations Act, as Amended (61 Stat. 316, 29 U.S.C. § 141, Et Seq.)

SEC. 2. When used in this Act

(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. . . .

(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in

negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * *

SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work

on any goods, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * *

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to

refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

* * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce

any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section (8)(b).

* * *

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.